United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

The debate now going on before the courts, the

75-7161

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
Docket No. 75-7161

BOSTON M. CHANCE, LOUIS C. MERCADO, et al.,

Plaintiffs-Appellees,

- against -

THE BOARD OF EXAMINERS, et al.,

Defendants.

- and -

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Defendant-Appellant.

- and -

COUNCIL OF SUPERVISORS AND ADMINISTRATORS OF THE CITY OF NEW YORK, LOCAL 1, SASOC, AFL-CIO,

Intervenor-Appellant.

REPLY BRIEF FOR COUNCIL OF SUPERVISORS AND ADMINISTRATORS OF THE CITY OF NEW YORK, LOCAL 1, SASOC, AFL-CIO

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UNITED STATES COURT OF APPEALS
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REPLY BRIEF FOR INTEVENOR-APPELLANT

I. ANSWERING APPELLEE'S POINT I

Appellees argue that the instant appeals from the February 7, 1975 order are untimely, and "are in essence an attempt by the Board of Education and CSA to collater-

stating that while Congress could have clearly intended

ally attack the November 22nd order", from which appellants should have appealed. This argument is frivolous.

The November 22nd order was not the final order of the district court on the excessing question. Neither the district court, nor any of the parties below, considered it as the final resolution of the excessing issue. See transcript of proceedings of December 20, 1974, 337a - 357a.

At the December 20th proceedings, the district court specifically stated that it welcomed the Board of Education's December 17th letter, suggesting modification of the November 22nd order as the court had expected to receive specific suggestions from all parties on the wording of the order. (338a) The court also stated that the November 22nd order was entered simply because no party had come forward with concrete proposals, and after it was entered ". . . everybody got upset. . . [so] I suggested that any ideas specific [sic] you had, lets have them". (340a) The court also told the appellants:

> "If you and Mr. Arricale would be prepared to submit a proposed order to everybody involved here including what you think is a better way of proceeding than by the three pools, obviously I would consider it." (344a)

See also 347a, where the court states:

> "You have an opportunity once again. I think its late already, but I am still willing to go along with another round. That is what I am offering you."

Thereafter, the Board of Education proposed, in place of the November 22nd order, an order providing for compensation to any supervisor who had been discriminated against by the pre-1971 examinations (360a - 373a); the appellees also proposed a counter-order (381a - 391a); and the CSA expressed the position that it could not join in or endorse any of the proposed orders. (393a)

On February 7, the district court entered an order, which it characterized in its contemporaneous memorandum opinion, as "an order designed to finally resolve the so-called excessing issue" and as the "final excessing order or decree. . . " (395a)

No appeal could have been taken before the final order of February 7th was entered. Providence Rubber Company v. Goodyear, (US) 6 Wall 153, 18 L ed 762 (1868), cited with approval, Federal Trade Commission v. Minneapolis-Honeywell R. Co., 344 US 206, 212 M. 12 (1952). As in Providence Rubber Company, it cannot be doubted that the

Negro applicants whom the Company unlawfully refused to

earlier order "was intended as an order settling the terms of the decree to be entered thereafter; and that the entry made on the later date was regarded both by the court and the counsel as the final decree in the cause." 18 L ed at 763.

Even if it is assumed that the November 22 order was a final order, the time in which to take an appeal was tolled by the district court's expressed willingness to consider on the merits the December 17th Board of Education letter asking for reconsideration of the November 22nd order. Thompson v. Immegration and Nationalization Service, 375 US 384 (1964); Hines v. Seaboard Airline R. Company, 341 F2d 229, 230 (2 Cir, 1965). Indeed had notices of appeal been filed contemporaneously with the December 17th request for reconsideration, they would have been to no avail. As the Supreme Court states in U.S. v. Healy, 376 US 75, 80 (1964):

> "It would be senseless for this Court to pass on an issue while a motion for rehearing is pending below, and no significant saving of time would be achieved by altering the ordinary rule to the extent of compelling a notice of appeal to be filed while the petition for rehearing

is under consideration."

Healy also notes:

> "Since the petition for rehearing was filed within thirty days of the judgment we are not faced with an attempt to rejuvenate an extenguished right to appeal."

ANSWERING APPELLEE'S POINT II

To state, as appellees do, that "there are numerous possible procedures for effecting a reduction of the work force that do not refer to the length of prior service" (BR. 17) is to ignore N.Y. Ed. Law Section 2585 and the validly executed collective bargaining agreement between the CSA membership and the Board of Education, both of which require excessing in inverse order of seniority. The district court order has nullified state law and the CSA contract provisions, and the primary issue on this appeal is whether the court had the power to do so under 42 USC Section 1983 in the facts and circumstances of this case.

Appellees concede that "there is nothing per se objectionable about this procedure- -" i.e. excessing in inverse order of seniority. (BR. 18) They ask this Court to sustain the order below nullifying seniority excessing because of "the fact that, because of this employer's past discrimination against minorities, the seniority standard is one which minorities cannot meet." (BR. 18) Yet, this "fact" was not established below, and indeed, the appellees have shown in their brief to this court, that it is not a fact at all. (BR. 23, ft.nt.)

take affirmative action to meet minority and female hiring

It was neither established nor found in the court below that the minority group supervisors given seniority preference in the district court's order are unable to meet a length-of-service standard sufficient to withstand excessing "because of this employer's past discrimination". By the appellee's own admission only 3% of the post-injunction appointees are persons who were formerly rejected because they failed discriminatory examinations. (BR. 23) By acknowledging that only 3% of the minority supervisors appointed after 1971 have been adversely affected in length of service by discrimination in hiring, the appellees necessarily concede that the remaining 97% are unable to meet a length of service requirement for reasons unrelated to "this employer's past discrimination".*

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*While appellees assert that the minority failure rate may have discouraged other minority group members from taking the supervisory examination, they have never come forward with any showing that any of the 97% who never took and failed a pre-1971 examination were otherwise eligible for supervisory appointment before 1971. For all that appears in the record below, the remaining 97% are all younger persons who had not qualified for a state license prior to 1971.

However, the district court order accords preferential seniority treatment to the remaining 97%, who - - by the appellee's own concession - - did not fail to achieve seniority because they were prevented from doing so because of the employer's discriminatory hiring practices. We believe that this concession that only 3% of post-injunction appointees were formerly rejected because they failed discriminatory examinations further establishes that the district court order is erroneous as a matter of law because it accords illegal preferential treatment to minority persons who have not suffered any adverse consequences from the pre-1971 discriminatory hiring practices, either because they passed a discriminatory exam and achieved their "rightful place" in the seniority system, or because they only became eligible for assignment and appointment after 1971, when the discriminatory hiring practices ceased. (CSA BR. 48).

As to that substantial portion of appellee's class who were not eligible for supervisory positions before 1971, or who achieved their rightful place despite the discriminatory examinations, it cannot be said that excessing in inverse order of seniority perpetuates the effects of past

discrimination.* See annexed address by William J. Kilberg, Solicitor of Labor, at p. 5 et. seg.

Past discrimination is not relevant to these persons seniority rank, since past discrimination had no adverse effect upon it. The appellees recognize this and seek to overcome it by arguing that in other situations, courts have imposed "affirmative requirements to terminate employment discrimination even though the beneficiaries of the remedy may not be the victims of past discrimination." (BR. 24) However, in other instances where affirmative action has been ordered, it has never included removal of senior employees from their positions so that these positions can be filled by junior employees, less qualified in terms of job experience, who have not experienced discrimination in hiring. See Kilberg speech, infra, pp.2-4.

No one can quibble with appellees statement that "the national policy against racial discrimination is of the 'highest priority'." (BR.26) However, to recognize

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*Assuming that a bona fide seniority system, where "the relevant seniority unit is the entire supervisory work force" (BR. 23) can be held to violate equal protection.

during a lay-off period, several District Courts have

this is not to dispose of the issues raised by this appeal. We have argued - - without contradiction from appellees - - that the district court's order creates inequities which will fall upon "other" supervisors, who played no role in pre-1971 hiring practices and who were not responsible for any discrimination in hiring. The artificial preferences accorded minority supervisors as against these persons are as inequitable to them as the discriminatory hiring practices were to the minority person seeking employment before 1971. The real question here is whether the national policy against discrimination "is the only value which the [14th] amendment enshrines, [or whether] even this laudable objective must be reached with proper weight given to other values in our society." Kaplan, "Equal Justice in an Unequal World", 61 No. W.U.L. Rev. 363, 382 (1966).

CONCLUSION

For all the foregoing reasons, the order appealed from must be vacated or modified.

DATED: New York, New York
June 10th, 1975

Respectfully submitted:

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NEW YORK, N. Y.

JUNE 3, 1975

"LAST HIRED, FIRST FIRED: IS IT LEGAL."

WILLIAM J. KILBERG
SOLICITOR OF LABOR

Good Evening

The title given to my address tonight "Last Hired, First Fired: Is It Legal?" is rather inhibiting. I would shun the implication raised by the stark language "Is It Legal" - that the last hired, first fired concept is susceptible of the easy distinction between legality or illegality when viewed in a factless vacuum. As I will discuss later, the various circuit and district courts which have addressed this issue have recognized its great complexity and have struggled mightily with the separate and equally compelling social goals brought before them.

Before any discussion of the last-hire, first-fire issue can be fruitful, it is important that the issue be properly framed. In discussions of complex and highly volatile topics, the lawyer's art of separating what is at issue from what is not at issue is crucial to an informed and coherent discussion. Unfortunately - on this topic - we have not heard many accurate descriptions of the issue.

It is said that the Bible often defines things by describing what they are not. In a similar fashion - but without divine inspiration - I shall attempt to begin this discussion by describing in some detail what is not, in fact, at issue.

The debate now going on before the courts, the agencies and the public is not about seniority, or more precisely, it is not whether seniority systems are per se inviolate or sacrosanct.

This issue was settled early under Title VII in Quarles v. Phillip Morris. In the Quarles case, the court reviewed the legislative history of Title VII, including the legislative statement of Senators Clark and Case, the colloquy between Senators Humphrey and Dirksen and the Justice Department memorandum and concluded that while Title VII clearly could not be used as a basis for attacking an otherwise bona fide seniority system, a seniority system which was racially discriminatory could not be considered bona fide within the ambit of §703(h). The court made the interesting distinction between departmental seniority, which was not protected per se, and employment seniority, which it deemed to be protected by 703(h). It then identified that aspect of the seniority concept - departmental seniority - as the system used to perpetuate discriminatory hiring practices.

Soon after the Quarles case was decided, the Fifth Circuit addressed the issue of a discriminatory seniority system in the case of Local 189 and Crown Zellerbach v. United States. Speaking through Judge Wisdom, the Court

established the framework by which this subject was to be addressed through the next seven years. The Court first reviewed the Quarles decision, and agreed with its principle that a seniority system which was inherently discriminatory could not be deemed bona fide and therefore fall under the protection of 703(h).

The Court then went on to discuss the various theories of equal employment opportunity remedies set forth in the 1967 Harvard Law Review Note, Title VII, Seniority Discrimination, and the Incumbent Negro, and applied them to the case before it. The three theories discussed in the law review were Freedom-Now, Rightful Place, and Status Quo. The Court opted for the Rightful Place theory as the one by which it was to be guided. It explicitly rejected the status quo theory, that is, it adopted the Quarles conclusion that a seniority system, passive on its face, but in fact used to perpetuate other discriminatory hiring practices could not stand. Thus where blacks were channeled into one department, they would not forever be anchored there by an exclusive departmental seniority system. On the other hand, the Court also rejected the Freedom-Now theory. The Court read the Freedom-Now theory to require displacement of white incumbents in order to remedy historical discrimination against blacks. The Court noted its unwillingness to take this extreme step by

stating that while Congress could have clearly intended to credit total time worked in a facility to a black worker, for purposes of seniority, it did not intend to create fictional seniority for workers who did not personally suffer discriminatory employment practices at the expense of incumbent whites. Quoting from the decision: "In other words, creating fictional employment time for newly-hired Negroes would comprise preferential rather than remedial treatment. The clear thrust of the Senate debate is directed against such preferential treatment on the basis of race."

The Quarles and Crown Zellerbach approach was subsequently adopted in a host of actions under Title VII. In addition, the Labor Department has used its authority under E.O. 11246, as amended, to reorder seniority systems when necessary. The Decision of Secretary Hodgson in the Bethlehem Steel, Sparrows Point case was perhaps the clearest statement of Department policy. Most recently, in the AT&T consent decrees and the Steel decree, the Departments of Labor and Justice and the EEOC agreed to complex changes and modifications of seniority systems in order to remedy discriminatory practices.

This rather lengthy discussion, however, reflects what is not at issue. The seniority systems which developed within facilities or industries are not sacrosanct - they

imagine. At the same time, it is unreasonable to declare

will be modified to remedy proven cases of discrimination. In each of these cases the seniority system as it existed was viewed to be a barrier to the ability of persons who had been the subjects of discrimination to move to those positions which, but for the discrimination, they would have been in. It is also interesting to note that the remedies themselves have almost always been couched in terms of seniority. One form of seniority has been traded for another.

The question, then, is whether the concept of seniority may be held to be discriminatory when those it affects adversely are not themselves the victims of a prior discrimination. The answer given to us by all the United States Circuit Courts of Appeals who have dealt with this issue is "no."

It will be instructive here to review the Circuit Court opinions in some detail - for within the opinions we can see some of the debate that must occur when the basic rights of real people are dealt with in a legal setting rather than as abstract theories bandied about by lawyers or other theologians.

The first case which must be discussed is Franks v. Bowman. In Bowman, the Fifth Circuit held that the District Court did not abuse its discretion in refusing to create constructive seniority as of the date of application for

Negro applicants whom the company unlawfully refused to hire because of their race. The court stated that while the black applicants who were rejected on racial grounds suffered a wrong, it did not believe that Title VII permitted the extension of constructive seniority to them as a remedy in light of Section 703(h). Quoting from the Court: "The discrimination which has taken place in a refusal to hire does not affect the bona fides of the seniority system. Thus, the differences in the benefits and conditions of employment which a seniority system accords to older and newer employees is protected as 'not an unlawful employment practice.'" The Court held that "present Bowman employees who have been discriminated against in the past and remain locked-in to the racial pattern by departmental seniority must be allowed to compete for jobs in other departments on the basis of full accumulated company seniority, and that this remedy should be made available for a reasonable time to permit them to take advantage of it." But the Court concluded, "We do not agree that constructive seniority may be created and awarded to those who are not employees."

The Bowman court here stretched the 703(h) protection of Title VII to its furthest limits. Not only did the court refuse to extend seniority to those employees who could not have attained it by their employment with the

company, it refused to grant it to the plaintiff who was denied employment after the passage of Title VII because of his race.

In Waters v. Wisconsin Steel, the plaintiffs contended that the company's seniority system perpetuated the effects of past discrimination in view of the fact that blacks would be laid off before and recalled after certain whites who might not otherwise have had seniority had the company not discriminated in hiring prior to 1964. The company argued that a seniority system which accorded workers credit for the full period of their employment was racially neutral and as such was a bona fide seniority system under Section 703(h).

The Seventh Circuit held that the company's "last hired, first fired" seniority system was not of itself racially discriminatory nor did it have the effect of perpetuating prior racial discrimination or violation of Title VII. The court highlighted the Quarles discussion arguing that an employment seniority system should be distinguished from job or department seniority systems for Title VII purposes. "Under the latter, continuing restrictions on transfer and promotion create unearned or artificial expectations of preference in favor of white workers when compared with black incumbents having an equal

or greater length of service. Under the employment seniority system there is equal recognition of employment seniority which preserves only the earned expectations of long-service employees. Title VII speaks only to the future. Its backward gaze is found only on a present practice which may perpetuate past discrimination. An employment seniority system embodying the 'last hired, first fired' principle does not of itself perpetuate past discrimination. To hold otherwise would be tantamount to shackling white employees with a burden of a past discrimination created not by them but by their employer. Title VII was not intended to nurture such reverse discriminatory preferences * * *."

In July 1974, Jersey Central Power and Light Company filed an action in United States District Court for the District of New Jersey against several union locals of the IBEW, the EEOC, the OFCC, the General Service's Administration (the Company's OFCC-designated compliance agency under Executive Order 11246) and the Division of Civil Rights of the New Jersey Department of Law and Public Safety. The Company sought declaratory relief with respect to its obligations under Title VII, E.O. 11246, a Conciliation Agreement between the Company and defendant unions and the EEOC entered into in December 1973, which provided that the company would

take affirmative action to meet minority and female hiring goals, and a collective bargaining agreement between the Company and defendant unions covering the period from November 1, 1973, through October 31, 1975.

The Company asserted in its complaint that it was forced by a severe financial crisis to lay off a substantial number of employees, and that if it laid off on the basis of plantwide seniority, as provided in the collective bargaining agreement, the percentage of minority and female employees in its workforce would likely decrease. Because of this projected reduction in minority and female representation, the Company asserted that in abiding by the collective bargaining agreement, it opened itself to liability under the EEOC Conciliation Agreement, Title VII and Executive Order 11246. The Company asked the court to decide whether it was obligated to layoff in accordance with the plant-wide seniority provisions of the collective bargaining agreement, or whether Federal law or the Conciliation Agreement required the Company to lay off in some other manner in order to minimize the effect of the layoff on its minority and female employees.

The District Court held that "to the extent that application of the seniority clause would substantially reduce the relative percentages of those whose hiring is the purpose of the EEOC agreement, it would be in frustration of it, and in violation of it." The Court stated, however,

hat it was not basing its judgment on either Title VII or Executive Order 11246.

On appeal, the Third Circuit held that the district court had erred in holding that the layoff provisions of the collective bargaining agreement conflicted with the conciliation agreement. The court pointed out that Title VII authorized the use of bona fide plantwide seniority systems and therefore the collective bargaining agreement could not be abrogated on the ground that it was in contravention of public policy. Thus, in light of Section 703(h), the only probative evidence in a Title VII challenge to a plantwide seniority system is evidence directed either to the neutrality of the system or to ascertaining an intent or design to discriminate under the guise of operating a plantwide seniority system. The court stated, "We believe that Congress intended a plantwide seniority system, facially neutral but having a disproportionate impact on female and minority group workers, to be a bona fide seniority system within the meaning of §703(h) of the Act." The court concluded that if a seniority system is bona fide, i.e., neutral, and not designed to disguise discrimination, it may not be overturned. "Our interpretation of the legislative history of Title VII (i.e., that Congress did not intend the chaotic consequences that would result from declaring unlawful all seniority systems which may disadvantage females and minority

group persons)* * * has been adopted by other courts as well. The Fifth and Seventh Circuits agree with our view of the legislative history even though they considered this question in the more traditional procedural context of a Title VII proceeding."

The Fourth Circuit has also apparently chosen to follow this trend. In Patterson v. American Tobacco Company, the court recently decided to stay the execution of a district court ruling which ordered two American Tobacco Company branches to institute an immediate bumping system in which any black or female worker could bid for almost any plant job and displace workers with less company seniority.

In the case of Meadows v. Ford Motor Co., the Sixth Circuit reviewed the problem and chose to remand back to the District Court for further evidentiary hearing. Noting that "the award of retroactive job seniority offers still greater problems" (than back pay) the Sixth Circuit instructed the District Court that "in dealing with job seniority, [the Court] need also consider the interests of the workers who might be displaced as well as the interests of the employer in retaining an experienced workforce."

While these Circuit Court holdings seem to point expressly to the principle that Title VII allows at least

a plantwide or employment seniority system to function during a lay-off period, several District Courts have still held that the protected rights of some classes of minorities and women take precedence. In perhaps the most widely reported case, Watkins v. Steelworkers Local 2369, the Eastern District of Louisiana held that layoffs and recalls based upon plan seniority are racially discriminatory where blacks have been prevented from acquiring long years of service because of the employer's past hiring discrimination against blacks in general. The court held that the company's history of racial discrimination in hiring made it impossible for blacks to have sufficient seniority to withstand layoffs; in this situation, the selection of employees for layoff on the basis of seniority unlawfully perpetuated the effects of past discrimination.

In reaching this result, the court held that the legislative history of the 1964 Act, including the statement by Senators Clark and Case indicating that passage of Title VII would not invalidate last-hired, first fired seniority agreements was not dispositive of the matter.

While it is doubtful that the Fifth Circuit, which rejected fictional seniority in Crown Zellerbach and expanded upon that holding to deny constructive employment seniority to an individual plaintiff illegally denied employment in Bowman, would affirm Watkins, it would be

appropriate to delve at some length into its factual setting. By doing so, we can get the clearest picture yet of the difficult problem placed before the courts.

The plaintiffs in Watkins were black employees in their twenties, who had been employed by the company between three and five years. The plaintiffs admitted in their briefs that none were personally denied employment due to their race, as in fact, none were old enough to work in 1965. The plaintiffs based their claim for job preference on allegedly discriminatory refusals to hire other unnamed blacks at unstated times prior to 1964. In contrast, the defendant union notes that the workers who would be adversely affected would be those still employed or at the top of the recall list, generally white males in their late forties or fifties, with over 20 years employment with the company. The union noted further that in an industrial plant, the hiring policies were completely controlled by the company. Thus, the white workers would, in a large sense, pay for the discriminatory practices engaged in by the company over ten years prior to the layoffs.

Not only did the court decree "fictional" seniority, it fashioned a complex formula for recalls based on the percentage of black employees employed in the company in 1971 at the time the layoffs began. It decreed that no incumbent employee be laid off, that the black employees receive back

pay and that all employees be paid on the basis of a 40-hour week regardless of the number of hours actually worked. In the event further layoffs were called for, it was to be done on the same black-white percentage as existed in 1971. Thus two employment systems were created, one black, and one white.

Where does this all leave us? The Government agencies with responsibility in the EEO area have been somewhat divided. There is general consensus that the Franks decision, insofar as it denied seniority to the individual plaintiff who proved that he suffered a discriminatory refusal of employment, stretched 703(h) beyond its natural limits. The case is now before the Supreme Court, and it will be interesting to see which way the court goes. But, absent an affirmation of Franks, it is doubtful that the decision will be dispositive of the issue. The factual setting of the case is such that a reversal of Franks would probably indicate only that plaintiffs who proved a discriminatory refusal to hire after 1964 could personally receive relief in the form of constructive seniority. It would then take another case, more cleanly drawn, to trigger a definitive Supreme Court ruling.

But in focusing on the cases in this area, it is easy to lost sight of the larger issues. How, for example, can a theory abrogating on its face the last hired, first fired

principle, be sustained in light of the Age Discrimination in Employment Act? After all, Congress saw fit in 1967 to give protected class status to persons between the ages of 40 and 65. As the facts in Watkins show, it is precisely those workers who would be most detrimentally affected. Some of you might remember that last December, the City of New York, in attempting to deal with its budget problems, proposed to mandatorily retire workers in the 62 to 65 age category. The proposed action, however, would have been violative of the Age Discrimination in Employment Act which the Labor Department enforces. The City had to withdraw its plan. Similarly, Congress has recently seen fit to give protected status to Vietnam-era Veterans and handicapped workers. How would they maintain their protected status were employment seniority for layoffs and recalls be abolished to protect minorities or women? Or, put another way, if such relief is appropriate in the context of disproportionate layoffs of minorities and women, would it not also be appropriate, under the authority cited, for handicapped persons and Vietnam-era veterans? And, if so, does it matter that the persons who would be adversely affected by extending this relief to the handicapped and veterans might themselves be minorities or women?

There is still a deeper and more underlying issue presented. What, in fact, would be the real results in terms of minority and female employment should the Watkins holding become law? Recent preliminary Bureau of Labor Statistics data indicated an interesting phenomena. While minorities and females still suffer a disproportionate share of unemployment compared to their percent of the workforce, they have apparently not suffered a greater share of the layoffs occasioned by the recession. That is, in percentage terms, they have held their share of the total workforce. Several reasons can be advanced for this. While minorities and women have been discriminated against in terms of job assignment, pay, and promotion, in most industrial areas where seniority is most prevalent, minorities, at least, have usually been able to achieve entry into the industry. Thus, the departmental seniority cases I discussed earlier all were directed at crediting minorities or women with the time they spent in the various companies, but lessening the impact of the time they were forced to stay in the least desirable departments due to departmental seniority. Another reason which can be pointed to is the growth of the white collar or service industry job as the percentage of the total workforce. In this sector, seniority is not an overriding factor in job retention or advancement. Women, particularly, have found substantial employment in the service industries.

And, in fact, our preliminary data suggest that women have been disproportionately underrepresented in layoffs. I am sure that the final BLS analysis will add further insight into this area, but it is certainly worth careful attention.

Another question which must be addressed is whether it is in the best interest of minorities and women to end the employment seniority system. Bayard Rustin has noted that the abolition of employment seniority would hurt blacks, that it has proved to be their best guarantee of job security. A recent meeting of black unionists in Baltimore revealed a deep split on this issue between older black workers who had reached a level of seniority which gave them relative protection and younger workers who were still near the bottom of the ladder.

There are still other problems with the District Court's reasoning in Watkins which, although not always explicitly dealt with, underly the rejection of that reasoning by the various circuit courts. As I have noted, the law of equal employment opportunity has recognized that remedying overt discrimination alone will not redress the evils of prior invidious practices. The Courts have, therefore, accepted the notion that the present effects of prior discrimination are deserving of relief. In fashioning that relief, the courts have, uniformly, accepted the so-called Rightful-Place

theory. That is, they have ordered that persons suffering the present effects of prior discrimination be given the opportunity to move to that place which, but for a prior discrimination, they might have been. If the Watkins reasoning were to be accepted, the courts would be ordering that persons be given the opportunity to move to that place which, but for a prior discrimination, their parents or grandparents would have been. This is a concept alien to American jurisprudence.

The logical conclusion of such a theory is the mandatory removal of existing incumbents in a workplace to be replaced by members of defined protected classes in order to achieve an allocation of persons of various racial, sexual, age, ethnic, physical and other backgrounds throughout the work-force in order to achieve some mythical notion of where persons with these backgrounds would have been but for some prior discrimination.

The issue, therefore, is not simply the legality or illegality of seniority. The notion of seniority, per se, is not sacrosanct. The effects of any particular seniority system must be viewed in the light of the particular factual context in which it is found -- and, I might point out, the combination and permutation of seniority systems in the United States is as great as the mind of man or woman can

imagine. At the same time, it is unreasonable to declare that seniority, per se, is an evil merely because in a given situation it may result in disparate treatment for members of one class or another. I believe that this is what the Congress has determined under Title VII. This is what the appellate courts of our land have found under that statute and others. And it reflects, in my view, the best reasoned judgment for which our citizenry looks to its laws.

Thank you.

AFFIDAVIT OF SERVICE BY MAIL

State of New York
County of Kings

DOCKET NO.: 75-7161

Blanche S. Wasserman, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age, and resides at 57 West 10th Street, New York, N.Y.

That on the 12th day of June 1975, deponent served the within Reply Brief for Council of Supervisors and Administrators, Local 1, SASOC, AFL-CIO, upon:

W. BERNARD RICHLAND, Corporation Counsel, City of New York, Municipal Building, New York, N.Y. 10007
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REBELL & KRIEGER, ESQS., 230 Park Avenue, New York, N.Y. 10017

Attorneys for Appellants and Appellees in the action, at the address designated by said attorneys for the purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post-office official depository under the exclusive care and custody of the United States Post Office Department within the State of New York.

Blanche S. Wasserman

Sworn to before me this
12th day of June 1975.

Leonard Greenwald

LEONARD GREENWALD
NOTARY PUBLIC, State of New York
No. 24-1563450
Qualified in Kings County
Commission Expires March 30, 1977